



**Australian Government**  
**Australian Public Service Commission**

Our reference: LEX 671

Anonymous

By email: jw4y1.i9ywy@silomails.com

Dear Applicant

**Freedom of Information Internal Review Request – LEX 671**

1. I am writing about your request for internal review, dated 4 October 2023, regarding a decision made by the Australian Public Service Commission (**Commission**) under the *Freedom of Information Act 1982 (FOI Act)*.

**Background**

2. On 5 September 2023, you requested the following documents from the Commission under the FOI Act:
  - *I request any and all documents that evidence, or tend to evidence, whether individually or collectively (i.e. in light of one another), that “materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O’Connor] was a process properly undertaken, and the appointment properly made.”*
  - *I request any and all documents that, whether individually or collectively (i.e. in light of one another), that **do not** support Kate McMullan’s finding that “materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O’Connor] was a process properly undertaken, and the appointment properly made.”*
  - *I request access to any and all documents that, whether individually or collectively (i.e. in light of one another), evidence the fact that the SES Band 1 National Judicial Registrar role (which Susan O’Connor was given) was the subject of a lawful “role review” such that the National Judicial Registrar role was allocated an EL2 classification under rule 9 of the Public Service Classification Rules 2000.*
  - *I request access to any and all documents that, whether individually or collectively (i.e. in light of one another), evidence the fact that the SES Band 1 National Judicial Registrar role (which Susan O’Connor was given) was **not** the subject of a lawful “role review” such that the National Judicial Registrar role was allocated an EL2 classification under rule 9 of the Public Service Classification Rules 2000.*

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3. On 4 October 2023, the FOI decision maker, Melanie McIntyre made a decision to refuse access to documents on grounds that all reasonable steps have been taken to find documents within scope of the request, and that no such documents meeting the description requested can be found.
4. On 4 October 2023, you sought an internal review of Ms McIntyre's decision regarding your request:

*I request any and all documents, whether individually or collectively (i.e. in light of one another), that **do not** support Kate McMullan's finding that "materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O'Connor] was a process properly undertaken, and the appointment properly made.*

**Decision**

5. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
6. I am satisfied that all reasonable steps have been taken to find documents within scope of your request, and that no such documents falling within scope were found to exist.
7. I therefore **affirm** Ms McIntyre's earlier decision by refusing your request for access to documents under section 24A of the FOI Act.

**Reasons for decision**

8. Subsection 24A(1) of the FOI Act provides:

*(1) An agency or Minister may refuse a request for access to a document if:*

- (a) all reasonable steps have been taken to find the document; and*  
*(b) the agency or Minister is satisfied that the document:*  
*(i) is in the agency or Minister's possession but cannot be found; or*  
*(ii) does not exist.*

9. The Office of the Australian Information Commissioner (**OAIC**) has issued guidelines under section 93A of the FOI Act. At paragraphs 3.88 to 3.93 of these guidelines, the OAIC provides guidance as to the meaning of the term 'all reasonable steps' for the purposes of subsection 24A(1) of the FOI Act. In this case these steps included searches of document management systems and emails.



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**Contacts**

10. If you require clarification on matters in this letter, please contact the Commission's FOI Officer by email at [foi@apsc.gov.au](mailto:foi@apsc.gov.au).

**Review rights**

11. You are entitled to seek review of this decision. Your review rights are set out at **Attachment A**.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'AH'.

Ms Amanda Harmer  
Authorised FOI decision maker  
27 October 2023





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**ATTACHMENT A**

## **Rights of Review**

### **Asking for a full explanation of a Freedom of Information decision**

If you are dissatisfied with this decision, you may seek external review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

### **Applying for external review by the Australian Information Commissioner**

If you do not agree with the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (OAIC) from the date you received this letter or any subsequent internal review decision.

#### **You can lodge your application:**

Online: [www.oaic.gov.au](http://www.oaic.gov.au)  
Post: Australian Information Commissioner  
GPO Box 5218  
SYDNEY NSW 2001  
Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

## **Complaints to the Information Commissioner and Commonwealth Ombudsman**

### ***Information Commissioner***

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992  
Website: [www.oaic.gov.au](http://www.oaic.gov.au)

### ***Commonwealth Ombudsman***

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone: 1300 362 072  
Website: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)



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**Australian Public Service Commission**

Anonymous

By Email: [jw4y1.i9ywy@silomails.com](mailto:jw4y1.i9ywy@silomails.com)

Our Reference: LEX 638

### **Freedom of Information request**

1. I am writing about your Freedom of Information (FOI) request under the *Freedom of Information Act 1982* (FOI Act) made **5 September 2023** for access to documents held by the Australian Public Service Commission (Commission).
2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from [www.legislation.gov.au](http://www.legislation.gov.au).

### **Documents relevant to your request**

3. You requested access to the following:
  - *I request any and all documents that evidence, or tend to evidence, whether individually or collectively (i.e. in light of one another), that “materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O’Connor] was a process properly undertaken, and the appointment properly made.”.*
  - *I request any and all documents that, whether individually or collectively (i.e. in light of one another), that do not support Kate McMullan’s finding that “materials provided by the FCA, including gazettal information and selection report, indicated that [the selection process relating to Susan O’Connor] was a process properly undertaken, and the appointment properly made.”*
  - *I request access to any and all documents that, whether individually or collectively (i.e. in light of one another), evidence the fact that the SES Band 1 National Judicial Registrar role (which Susan O’Connor was given) was the subject of a lawful “role review” such that the National Judicial Registrar role was allocated an EL2 classification under rule 9 of the Public Service Classification Rules 2000.*

- *I request access to any and all documents that, whether individually or collectively (i.e. in light of one another), evidence the fact that the SES Band 1 National Judicial Registrar role (which Susan O'Connor was given) was not the subject of a lawful "role review" such that the National Judicial Registrar role was allocated an EL2 classification under rule 9 of the Public Service Classification Rules 2000.*
- *If the documents requested are not in the control of the Australian Public Service Commission, do not transfer this request to the agency that has the documents: *Bienstein v Attorney-General* [2007] FCA 1174, [38]. If the requested documents are not in the control of the Australian Public Service Commission, please simply refuse access to the documents under section 24A of the FOI Act.*

## **Decision on your FOI request**

4. I am authorised under subsection 23(1) of the FOI Act to make FOI decisions.
5. I am satisfied that all reasonable steps have been taken to find documents within scope of your request, and that no such documents meeting the description of what you have asked for can be found or exist.
6. As such, I refuse your request for access to documents pursuant to section 24A of the FOI Act.

## **Reasons for decision**

*Section 24A – documents that cannot be found or do not exist*

7. Subsection 24A(1) of the FOI Act provides:
  - (1) An agency or Minister may refuse a request for access to a document if:
    - (a) all reasonable steps have been taken to find the document; and
    - (b) the agency or Minister is satisfied that the document:
      - (i) is in the agency or Minister's possession but cannot be found; or
      - (ii) does not exist.
8. The Office of the Australian Information Commissioner (OAIC) has issued guidelines pursuant to section 93A of the FOI Act. At paragraphs 3.88 to 3.93 of these guidelines, the OAIC provides guidance as to the meaning of the term 'all reasonable steps' in subsection 24A(1). In this case these steps included searches of document management systems and emails.

## **Contacts**

9. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3813 or by email at [foi@apsc.gov.au](mailto:foi@apsc.gov.au).

## **Review rights**

10. You are entitled to seek review of this decision. Your review rights are set out at **Attachment A**.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Melanie McIntyre', with a long horizontal line extending from the end of the signature.

Melanie McIntyre  
FOI decision maker  
4 October 2023

## **Rights of Review**

### **Asking for a full explanation of a Freedom of Information decision**

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

### **Seeking review of a Freedom of Information decision**

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by an different officer of the Australian Public Service Commission;  
and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

### **Applying for a review by an Internal Review Officer**

If you apply for internal review, a different decision maker to the departmental delegate who made the original decision will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

**Email:** [foi@apsc.gov.au](mailto:foi@apsc.gov.au)

**Post:** The FOI Officer

Australian Public Service Commission

B Block, Treasury Building

GPO Box 3176

Parkes Place West

PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.



## **Applying for external review by the Australian Information Commissioner**

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: [www.oaic.gov.au](http://www.oaic.gov.au)

Post: Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Email: [enquiries@oaic.gov.au](mailto:enquiries@oaic.gov.au)

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

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[www.ombudsman.gov.au](http://www.ombudsman.gov.au)